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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956.

## No. 663

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, FLORIDA FRUIT AND VEGETABLE ASSOCIATION, FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, CALIFORNIA CITRUS LEAGUE, WESTERN GROWERS ASSOCIATION, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ATLANTIC COAST LINE RAILROAD COMPANY, ARMOUR AND COMPANY, ET AL., *Appellees*.

**Appeal from the United States District Court for the Northern District of Florida.**

## STATEMENT AS TO JURISDICTION.

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**Appeal from the United States District Court for the Northern District of Florida.**

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## STATEMENT AS TO JURISDICTION.

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Florida Citrus Commission, Growers and Shippers League of Florida, Florida Canners Association, Florida Citrus Mutual, Florida Fruit and Vegetable Association, Chase and Company, A. Duda & Sons Coop. Association, Florida Railroad and Public Utilities Commission, California Citrus League, and Western Growers Association, Appellants, submit this jurisdictional statement in compliance with Rule 15 and paragraph 2 of Rule 13 of the Revised Rules of the Supreme Court of the United States.

**(a) OPINION DELIVERED IN THE COURT BELOW.**

The opinion of Circuit Judge Jones, with which District Judge Barker concurred, and the special concurring opinion of District Judge DeVane, rendered on September 7th, 1956, in the United States District Court for the Northern District of Florida, Tallahassee Division, No. 565, wherein Florida Citrus Commission, et al., were plaintiffs, Ezra Taft Benson, Secretary of Agriculture, et al., were intervening plaintiffs, and United States of America, et al., were named defendants, and Atchison, Topeka and Santa Fe Railway Company, et al., were intervening defendants, have been printed in 144 F. Supp., pages 517 to 528. A copy thereof is appended hereto as Appendix I.

Likewise, a copy of the Report of the Interstate Commerce Commission, dated January 9, 1956, in Docket No. 31342, Proposed Increased Refrigeration Charges, 297 I.C.C. 505, is appended hereto as Appendix II; the order of the Commission, sought to be enjoined, annulled and set aside in the lower Court, having been rendered pursuant to said Report of the Commission.

**(b) GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.**

**(i) Nature of Proceeding, and Statutory Provisions.**

This Appeal is from the final decree of a three-Judge District Court dismissing the complaint which sought to enjoin, annul and set aside an order of the Interstate Commerce Commission.

The complaint in the court below was one to enjoin, annul and set aside an order of the Interstate Commerce Commission, entered by it pursuant to the Report in Docket No. 31342, Proposed Increased

Refrigeration Charges, 297 I.C.C. 505; and was filed under the provisions of Title 28, United States Code, Sections 1336, 1337, 1398, 2321, 2322, 2323, 2324, 2325 and 2284.

**(ii) Dates of Decree and Notice of Appeal.**

The final order of the three-Judge District Court denying the relief sought by the plaintiffs (and intervening plaintiffs) and dismissing the complaint, was dated and entered on September 7th, 1956, at Tallahassee, Florida, in the United States District Court for the Northern District of Florida, Tallahassee Division.

The Notice of Appeal herein was filed in said United States District Court for the Northern District of Florida, at Tallahassee, Florida, on November 5th, 1956.

**(iii) Statutory Provision Conferring Jurisdiction of This Appeal.**

The jurisdiction of the Supreme Court to review the final decree of the three-Judge District Court of the Northern District of Florida, by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b).

**(iv) Cases Sustaining Jurisdiction.**

The jurisdiction of the Supreme Court to review, on appeal, the final decree of the District Court, is sustained by many cases, including the following:

*Louisville & Nashville Railroad Company, et al.* v. *United States, et al.*, 242 U.S. 60, 61 L. ed. 152, 37 S. Ct. 61.

*North Carolina* v. *United States,* 325 U.S. 507, 89 L. ed. 1760, 65 S. Ct. 1260.

*United States* v. *United States Smelting, Refining & Mining Co.,* 339 U.S. 186, 94 L. ed. 750, 70 S. Ct. 537.

*Secretary of Agriculture* v. *United States,* 347 U.S. 645, 98 L. ed. 1015, 74 S. Ct. 826.

*Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567, 91 L. ed. 1102, 67 S. Ct. 894.

*Frozen Food Express* v. *United States,* U.S. , 100 L. ed. (advance sheet 500), S. Ct. .

**(c) QUESTIONS PRESENTED BY APPEAL.**

The threshold question presented by this appeal is whether the statutory three-Judge District Court erred in refusing to consider the merits of the case, and, acting on its erroneous view that there was no justiciable issue, in dismissing the complaint.

Stated another way, may parties, aggrieved by increased refrigeration charges, maintain in the District Court (pursuant to Title 28, United States Code, Sections 1336, 2325) an action to enjoin, annul and set aside the final order of the Interstate Commerce Commission approving and authorizing the increased charges, when the order was entered in an investigation concerning the lawfulness of proposed increased charges for such accessorial service, is based on its Report containing certain findings, and (a) authorizes the approved increased charges and (b) modifies outstanding orders so as to permit the approved increases to be made effective.

Subsidiary questions include:

(1) Whether the findings of the Commission, taken as a whole, support the statements of the District Court that "the Commission's order is permissive, no particular charges are fixed, and the lawfulness of particular charges was not considered or decided."

(2) Whether the case is "governed by the doctrines of the general revenue cases," thereby depriving plaintiffs of their right to judicial review, or whether the order is one which the Court should set aside on a complaint showing no lawful basis therefor.

(3) Whether the plaintiffs mistook their remedy by appealing to the Court to set aside the Commission's order, instead of filing a futile additional complaint with the Commission under Sections 13 and 15 of the Interstate Commerce Act seeking a determination of what is determined in the Commission's Report.

Questions, on the merits, presented by the complaint to the District Court, and involved here, include:

(1) Whether the Interstate Commerce Commission has the power to approve and authorize, or exceeded its power in approving and authorizing, a uniform nation-wide 15 percent increase in all charges for refrigeration services, despite findings in the Report, and undisputed evidence, that some existing charges were greater than cost plus a fair return, other charges were above or below cost by widely varying amounts, and some charges returned a very small part of the cost of performing the service.

(2) Whether the Commission could approve and authorize an increase in certain charges (on traffic estimated in the Report to constitute 43 percent of the

total) in the absence of any evidence or findings with respect to the cost thereof, although all refrigeration charges are based on cost.

(3) Whether the Commission was empowered to authorize increases in certain charges, which are shown by the evidence and by the findings in the Report, to be in excess of what the Commission found to be cost plus a fair return.

(4) Whether the Commission's order is supported by evidence and findings, when the Report shows that its conclusion is based on a "traffic study" which, the Report states (297 ICC 521), "afforded no mathematical chance for all of the railroads, all origin and destination areas, and all of the affected traffic to be included, and may have rendered it unrepresentative as to the whole body of traffic."

(5) Whether unlawful discrimination, contrary to sections 2 and 3 of the Interstate Commerce Act, exists or is created by a uniform percentage increase in all refrigeration charges, although "section 4" charges (on fresh meats and packing house products) are published for only three elements of cost, and "section 2" charges (on fresh fruits and vegetables) are based on as many as nine elements of cost.

(6) Whether there was any actual determination of costs by the Commission, sufficient to support findings and authorize any increase in individual rates and charges.

### (d) STATEMENT OF THE CASE.

Refrigeration or icing service is transportation. It is wholly impracticable to include in the line-haul rates specific amounts to cover refrigeration costs.

Therefore, refrigeration charges, separate and distinct from and in addition to line-haul rates, are published in the Perishable Protective Tariff, Agent W. T. Jamison's ICC No. 31.[1]

Section 2 of the Perishable Protective Tariff states refrigeration charges applicable generally for refrigeration services in connection with the movement of fresh fruits and vegetables, while the charges provided in section 4 of the tariff embrace all other commodities such as fresh meats and packing house products. The term "section 2 charges" frequently is used to indicate the charges in section 2 of the tariff, and "section 4" refers to section 4 of the tariff.[2]

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[1] 49 USCA sec. 1(3)(a): "* * * The term 'transportation' as used in this part shall include * * * refrigeration or icing * * *."

49 USCA sec. 6(1): "That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation * * *. The schedules printed as aforesaid by any such common carrier * * * shall also state separately * * * icing charges, and all other charges which the Commission may require, * * *."

Docket No. 20769, Charges for Protective Service to Perishable Freight, 215 ICC 684, 696: "It is wholly impracticable to include in line-haul rates specific amounts to cover refrigeration costs. The identity of whatever amount that might in the first instance be included in a line-haul rate to cover refrigeration service would sooner or later be lost in the inevitable readjustments to which line-haul rates are subject. Doubtless this has occurred to a greater or lesser extent wherever an attempt has been made to so handle such costs in the past, with consequent loss to the carriers and undue advantage to shippers who have used section 4 service as compared with shippers who were under the necessity of using section 2 service."

[2] In Perishable Freight Investigation, 56 ICC 449, it was shown that there were two general methods of charging for icing service, (1) the "stated-charge" method (or section 2 charges), and (2) the "cost-of-ice" method (or section 4 charges). "Under the former, the carrier undertakes for a stated charge to render such service from point of origin to destination; under the latter, to furnish at a published charge per ton whatever quantity of ice may be directed by the shipper." (151 ICC 651).

In Docket 17936, Refrigeration Charges on Fruits, etc., from the South, ICC 649, decided February 12, 1929, the Interstate Commerce Commission found unreasonable, refrigeration charges from southern origins to destinations in trunk-line and New England territories "after detailed investigation of the cost of the service to which they apply;" and therein found that the charges for standard refrigeration "are and for the future will be unreasonable to the extent that they exceed, or may exceed" specified levels. An order was entered that the carriers cease and desist, and abstain from publishing, demanding or collecting "charges which exceed, or may exceed," those prescribed as maximum.[3]

In Docket 20769, Charges for Protective Service to Perishable Freight, 215 ICC 684, decided June 2, 1936, the Commission determined and set forth the cost of the several elements entering into the furnishing of refrigeration service throughout the country. Also, reasonable maximum charges for standard refrigeration and for certain modified services (section 2) were prescribed from Arizona and California origins; and it was further ordered that the carriers establish, maintain and apply charges under Section 4 "to cover the cost of ice placed in the bunkers of refrigerator cars, the cost of switching refrigerator cars to and from ice docks, the cost of supervision, the cost of station and auditors

[3] "Standard service contemplates initial icing to bunker capacity at point of origin and reicing to capacity at regular icing stations en route." (151 ICC 652).

accounting, the cost of bunker repairs, and the cost of ice haulage.'"[4]

In Docket 28994, Half Stage Refrigeration Service, 256 ICC 213, decided August 31, 1943, the Commission prescribed maximum charges for half-stage refrigeration (section 2) and ordered that such charges for the future should not exceed 78 percent of the corresponding charges maintained for full-tank refrigeration.[5]

Docket No. 31342, Proposed Increased Refrigeration Charges, 297 ICC 505, was decided January 9, 1956,

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[4] Modified section 2 services for which charges were prescribed in Docket 20769 included:

Rule 240: Initially iced, do not re-ice.
Rule 242: Top or body icing service (ice supplied by shippers).
Rule 245: Citrus fruits, precooled and pre-iced, either by shipper or carrier, do not re-ice or re-iced once by carrier—varying charges dependent upon service.
Rule 249: Citrus fruits, initially iced by shipper or carrier, re-iced, once by carrier—varying charges dependent upon service.
Rule 247: Deciduous fruits or vegetables, initially iced by shipper or carrier, re-iced once by carrier—varying charges dependent upon commodity and upon service.

[5] Dockets 17936, 20769 and 28994 are the three proceedings named in the carriers' petition in Docket 31342, page 2 thereof: "The charges contained in the aforesaid Sections (2 and 4) of said Tariff include those prescribed by the Commission in Docket 17936, Refrigeration Charges on Fruits, etc., from the South, 151 ICC 649 (February 12, 1929), affirmed 172 ICC 3 (February 3, 1931), Docket 20769, Charges for Protective Service to Perishable Freight, 215 ICC 684 (June 2, 1936) as subsequently modified by the Commission's Order of October 1, 1940, 241 ICC 503, and reaffirmed by the Commission's Order of September 8, 1942, 253 ICC 351, and Docket 28994, Half-Stage Refrigeration Service, 256 ICC 213 (August 31, 1943)." It is further shown that two 15% increases were authorized under Ex Parte 162, Increased Railway Rates, Fares and Charges, 1946, 266 ICC 537, and under Ex Parte 166, Increased Freight Rates, 1947, 270 ICC 403. The Commission denied further increases in refrigeration charges sought by the carriers in Ex Parte 168, Increased Freight Rates, 1948, 276 ICC 9, Ex Parte 175, Increased Freight Rates, 1951, 284 ICC 589, and Ex Parte 196, Increased Freight Rates, 1956, 298 ICC 279.

but the report was not served on the parties until January 30, 1956. The order therein makes the report a part of the order, and orders that:

> "increases in refrigeration charges, to the extent authorized in the report of this date, may be made effective upon not less than 30 days' notice to the Commission and to the general public by filing and posting in the manner prescribed in the Interstate Commerce Act;
>
> "outstanding unexpired orders in other proceedings are hereby modified so as to permit the establishment of the increases in refrigeration charges herein authorized;
>
> and
>
> "all tariff schedules changing charges under the authority of this order, which charges are now maintained or held in force by virtue of outstanding orders of the Commission, shall make specific reference to this order."

Docket No. 31342 was initiated by a petition of the railroads that the Interstate Commerce Commission "institute an investigation into the adequacy of railway refrigeration charges and (to) authorize Petitioners to increase such charges in the manner and to the extent set forth in Appendix II hereto." Generally, the proposal of the railroads was "to increase by 30 percent * * * the charges published in section 2 * * * and to increase by specified amounts the charges published in section 4 of the same tariff" (297 ICC 506). The prayer of the railroads' petition was that:

> "the Commission institute an investigation into the adequacy of the refrigeration charges;

"the Commission determine and find that the increased charges here proposed will be just and reasonable;

"the Commission modify its orders in Dockets Nos. 17936, 20769, and 28994 to the extent necessary to assure that the increased rates and charges will be made effective as proposed herein;

"the Commission grant such other and further relief as may be required in the premises."

After testimony, briefs, a proposed report by the Hearing Examiner, exceptions thereto and replies, and oral argument before the Commission, a report bearing date January 9, 1956, as aforesaid, was served. The report found "that an increase in the specified refrigeration charges in excess of 15 percent is not justified," that "the basic refrigeration charges may be increased as herein specified, and that the charges so increased will be just and reasonable for the future," and that "all the basic charges * * * may be increased 15 percent within and between all territories" (297 ICC 554).[6]

[6] Commissioner Clarke dissented as follows:

"I am opposed to a uniform increase of 15 percent on each and every rate or charge published in section 2 of the Perishable Protective Tariff as authorized by the majority. It is a well-established principle that charges for refrigeration service should cover the cost thereof, plus a fair return, but no more. All of the earlier refrigeration decisions proceeded upon the logical theory that precise charges, based on costs alone, would be required. That particular theory is abandoned, however, by the majority.

"It is my opinion that authorizing a flat percentage increase in charges for accessorial services, regardless of the results shown for particular commodities or particular classes of service, violates the basic precepts of reasonableness and lawfulness in the Interstate Commerce Act. It results in increasing charges which are already equal to or above total costs and overcharging certain commodities, or certain move-

As heretofore indicated, "the prescribed charges (for refrigeration service) were predicated on the determination that they should be sufficient to cover the cost thereof plus a fair return on the investment in facilities required for the performance of the services. Being accessorial to the basic line-haul service, these charges were prescribed as exact charges, necessary to cover the additional cost incurred by the carriers in performing the services." (297 ICC 506) Necessarily therefore, the entire report of the Commission in Docket 31342 deals primarily with the evidence relating to the costs of the various elements of service and their applicability to particular services. The Commission, in its report, made various findings as to the cost of the various

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ments, or certain types of service, in order that other commodities or other movements or other types of service may be moved at a loss.

"The majority states 'In the establishment of a structure of charges of national scope it is impracticable to accomplish uniformity in the relation to costs.' However, the present structure of charges, based on costs, is national in scope, and, as indicated, it covers numerous specific services, commodities, and origin and destination groups. The very cost figures submitted by the carriers and used in the report with certain adjustments, to show nation-wide revenues, costs, and losses, were initially compiled from more specific data which show separately the costs and revenues for a particular type of service from a selected origin group to a selected destination group on a particular commodity. If such data is not sufficiently complete to arrive at separate increases for each service, or each commodity, it is due entirely to the failure of the carriers to develop such data. To reward them for that failure by allowing a blanket increase, knowing that it will result in certain commodities and certain services bearing more than their fair share of the costs involved, seems incongruous.

"I would authorize increases only in those instances where it has been clearly shown that the charges do not cover the cost of rendering the services involved and then no more than the amount necessary to close the gap between the specific charges and the comparable costs."

elements,—the carriers' evidence as to cost of ice (297 ICC 527) and the Commission's restatement of the cost of ice (297 ICC 532), the cost of salt (297 ICC 532, 533), the cost of switching (297 ICC 533-535), the supervision cost (297 ICC 535-536), the haulage of ice cost factor (297 ICC 536-539), the damage to bunkers and bodies of refrigerator cars (297 ICC 539), station and auditors accounting cost (297 ICC 539, 540), hazard (297 ICC 541), precooling cost (297 ICC 541-543), and the Commission's restatement of the cost of rendition of certain section 2 services (297 ICC 543).[7]

It was not the purpose of the complaint before the District Court, nor of this appeal, to review in detail voluminous evidence bearing on each of the several elements of costs nor the findings of the Commission with respect thereto. On the other hand, as will be pointed out, there are serious departures from the standards of the Interstate Commerce Act in some of those specific findings, and the ultimate result is contrary to the lawful standards even if the costs of individual elements as found by the Commission be adopted.

There are two main differences between the section 4 and the section 2 refrigeration charges in the tariff. First, of course, charges under section 4 are made for the specific amounts of ice and salt placed by the

[7] "The elements of expense that enter into the cost of furnishing refrigeration services fall into the following groups: Cost of ice in bunkers; supervision; switching to and from icing stations; bunker repairs, repairs of damage to cars caused by top or body icing; haulage of ice in bunkers; station and auditor's accounting cost; hazard; taxes; return on investment in facilities devoted to the performance of refrigeration services; and cost of precooling." Note 2 at bottom of page 508 of 297 ICC.

carriers in the bunkers of cars as directed by the shippers—ice at the tariff charge per ton, salt at the tariff charge per hundred pounds, and switching at the tariff charge therefor per icing regardless of whether any switching was performed in the icing. On the other hand, the section 2 tariff charge is a "stated charge" for the entire refrigeration service, the amount of which depends upon (a) the commodity involved (i.e. whether citrus fruit, deciduous fruit, melons, vegetables, or frozen foods), (b) the origin, (c) the destination, and (d) the type of refrigeration service rendered, i.e. whether standard refrigeration, a modified service such as Rule 240 (initial icing by shipper, do not re-ice), or top-icing under Rule 242 (from the West) or Rule 243 (from the South).

Second, there is no refrigeration charge under section 4 of the tariff for any element of cost except ice, salt and switching—no charge being provided in the perishable protective tariff for supervision, station and auditors accounting, bunker repairs, or ice haulage (although required by the order in Docket 20769, 215 ICC 684, 798). On the other hand, section 2 charges cover all of the enumerated elements of expense that are applicable to the particular service.[8]

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[8] "The prescribed section 2 charges are predicated on those elements, which will be discussed hereinafter in more detail. The present section 4 charges include only the elements of ice, salt, and switching." (297 ICC 507).

"The section 2 charges, as noted, cover the several enumerated elements of expense, while the section 4 charges cover only the elements of ice, salt, and switching. The elements of expense for supervision, station and auditors accounting, and ice haulage, which are covered by the section 2 charges, but not included in the section 4 charges, amount to about 19 percent thereof." (297 ICC 523).

"After extensive investigations in the prior proceedings, we made definite determinations as to the costs of the several elements

As a preliminary to the filing of the petition in Docket 31342, the railroad traffic executives concluded that they would "conduct a comprehensive study of the costs of providing refrigeration service for the purpose of determining whether the revenue therefrom was sufficient to cover the entire cost of performing the service, plus a fair return on the investment in facilities devoted to the performance thereof" (297 ICC 509, 510). That study was divided into two parts, viz.: (1) "ascertaining the total costs of ice and salt for all perishable traffic," and (2) "the total costs for the complete refrigeration service rendered for a representative number of shipments accorded bunker re-icing service subject to the section 2 charges." (297 ICC 510).

As to the first study, i.e. costs of ice and salt, a total of 1,678 locations on 124 railroads were covered by the more than 2,000 reports of the carriers. The results, placed in evidence in the record before the Commission, are discussed on pages 524 to 532 as to "Cost of Ice," and on pages 532 and 533 as to "Cost of Salt."

No point herein has been made relative to the finding of the Commission as to "cost of salt," except that of the different conclusion reached with respect thereto as to section 4 charges, on the one hand, and section 2 charges on the other. The Commission

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of expense and required the establishment of charges accessorial to the line-haul rates to compensate those costs on both section 2 and section 4 traffic. The section 2 charges became effective and have been applied for many years, but because our order as to the section 4 charges for the elements stated was stayed temporarily by the United States District Court for the Northern District of Illinois, and was subsequently vacated, those charges never became effective." (297 ICC 524).

found the cost to be $1.04 per hundred pounds, and authorized an increase in the section 4 salt charges from 99¢ to $1.04. On the other hand, as to section 2, "when salt is supplied by the carrier in icing or reicing perishable shipments, it is subject to varying charges in addition to the stated refrigeration charge. The maximum addition is 50 percent of the stated charge for standard refrigeration, and lesser additions apply when less than the stated maximum of salt is used" (297 ICC 508). In other words, on the same evidence and the same findings as to cost of salt, the Commission authorized an increase from 99¢ to $1.04, or about 5 percent, for section 4 salt charges, and authorized an increase of 15 percent, or three times as great, on section 2 charges for salt.

Compilation of results of the reports of the carriers as to cost of ice at the individual stations is set forth by "groups" on page 527 of 297 ICC. Those "average costs" by "groups" were restated by the Commission and set forth in the table on page 532. The present tariff charges for groups 1, 4 and 10 respectively are $4.04, $5.49 and $6.28. The carriers' reported costs average in such groups was respectively $5.07, $5.71 and $7.16. The Commission's restated average cost per ton of ice in said groups respectively is $4.60, $5.69 and $6.96. The importance thereof to fruit and vegetable growers and shippers (Florida, California and Texas interests), is that group 1 includes California (less certain stations on Great Northern Railway Company and Southern Pacific Company, 297 ICC 597), group 4 is Florida, and group 10 includes Texas. The increase authorized uniformly throughout the United States was 15 per-

cent, despite the lower group average costs found by the Commission as above.

No point herein is here raised with respect to the amounts found proper by the Commission for switching, supervision, haulage of ice, supervision, damage to bunkers, station and auditors accounting cost, hazard, and precooling, except:

(1) As to switching, the Commission found (297 ICC 535): "The evidence presented is insufficient to permit a determination of accurate costs, prerequisite to the authorization of the specified charges proposed;" and then authorized an increase of 15 percent in the section 4 switching charges, and in restating the costs of section 2 bunker re-icing services used an increase of 146 percent in the switching factor.

(2) As to the other enumerated elements (which the Commission says amount to about 19 percent of the restated section 2 costs) which are not included at all for section 4 traffic, the issue has been continuously presented as to whether such factors (and increased factors as well) can lawfully be used in authorizing an increase in section 2 charges when in the same proceeding it is affirmatively shown and found by the Commission that none of the same elements (although applicable) are charged, nor any charges nor increased charges therefor proposed, against section 4 traffic.

(3) All of the elements of costs are not applicable to all section 2 services, and the applicable elements apply in varying degrees to the different services; yet the determination of the percentage of deficit used by the Commission in arriving at the authorized increase of 15 percent was derived from a use of a composite

of all factors applied to the sample section 2 bunker-reiced traffic.[9]

The second study of the carriers was for the purpose of ascertaining "the total costs for the complete refrigeration service rendered for a representative number of shipments accorded bunker re-icing services subject to the section 2 charges." It was the more difficult, for "the charges for the various (section 2) refrigeration services differ widely dependent upon the character of the service rendered" (297 ICC 508). Standard refrigeration service requires initial icing and re-icing by the carrier at all regular icing stations en route from origin to destination. "There are about six different sets of charges (for standard refrigeration) dependent partly upon the commodity involved." There are various types of modified section 2 services, initial icing by the shipper with no icing by the carrier, initial icing by the carrier with no re-icing in transit, pre-icing and replenishing by carrier with no re-icing in transit or with one, two or three re-icings in transit, top or body icing by the shipper, top or body re-icing in transit by the carrier, etc. (see 297 ICC 558). The tariff charges "for the several types of modified services * * * range from about 15 to 85 percent of the charge for standard

[9] An illustration of the varying amount of service, and the consequent variance of applicable cost factors is stated, 297 ICC 518, 519: "The 4 elements of cost of providing Rule 240 service, for example, are (haulage of ice), hazard, station and auditors accounting, and bunker repairs, whereas there are 9 elements of cost in bunker re-iced service."

Another illustration is the Rule 242 and Rule 243 top or body icing service, where the ice used in the body of the car i.e. on top of the lading in the car, is never placed therein by the carrier but is always furnished by the shipper at his own cost and therefore not covered by the "cost of ice" factor; and likewise a number of the other elements of cost do not apply to such section 2 service.

refrigeration between the same points, the lowest being for rule 242 service when 10,000 pounds of ice is used, and the highest applying in connection with shipments accorded rule 245 service with, for example, pre-cooling, pre-icing and replenishing by the carrier, and re-icing three times in transit" (297 ICC 508).

Accordingly, for the purpose of obtaining a sample approximating 10 percent of the "shipments accorded bunker re-icing service," the carriers selected "shipments in refrigerator cars having numbers terminating in the digit 5." (297 ICC 511). Such selected traffic sample embraced section 2 bunker-reiced shipments from selected origins to selected destinations. The sample "does not include any shipments moved under any of the various modified services, such as rule 240, where no bunker re-icing service was performed" (297 ICC 516).[10] Each of the bunker re-iced shipments in the traffic sample was then considered with respect to the revenue at existing tariff charges and with respect to costs determined in the following manner: The total number of tons of ice supplied in each State, the total number of icings, the miles of haul, the commodity hauled, and the average weight of ice hauled, were determined for each shipment. The "cost of ice" was developed by applying to the number of tons furnished in each State the average cost per ton for the "group" in which the State was located (not the average cost of ice at the icing station or even the average cost of ice per ton for the State where furnished). The "haulage of ice" factor was

[10] The Commission found: "The petitioners' study afforded no mathematical chance for all of the railroads, all origin and destination areas, and all of the affected traffic to be included, and may have rendered it unrepresentative as to the whole body of traffic." (297 ICC 523).

computed by applying the cost per ton-mile to the ton-miles developed from the average weight of ice hauled and the miles of haul. Switching and supervision costs were computed by applying the respective unit cost to the number of icings. The accounting, hazard and bunker repair factors (per trip) were then added to the switching, supervision, haulage of ice, and cost-of-ice expenses developed as aforesaid, to give the total computed costs of the particular refrigeration service.[11]

As has been noted heretofore, the purpose of the traffic study was to obtain "a sample approximating 10 percent of the shipments accorded *bunker re-icing service,*" etc. This purpose intentionally excluded all refrigeration services which did not fall within that category,—i.e. an exclusion of all services which did not require "bunker re-icing" by the carriers. In other words, no shipments on which top ice or initial

[11] The different results as to the "total cost of ice" used in a particular bunker re-iced service, derived from "group" average cost, State average cost, or average cost at the specific icing station where the ice was furnished, is astounding. For example, for ice furnished at Potomac Yard, Va., on all cars in the traffic study, the carriers used the "group 8" average of $7.03 per ton. The average cost for all ice furnished in the State of Virginia was shown to be $5.87 per ton. The average for ice furnished at Potomac Yard, Va., was only $4.83 per ton. Yet, all ice furnished in Virginia for the traffic sample shipments embraced in the Commission's "restatement of results of petitioners' cost data," (297 ICC 543), was computed at the restated group 8 average cost of $6.91 per ton (297 ICC 532). This great variance arises solely from the inclusion in "group 8" of ice costs from 19 States and the District of Columbia, ranging from an average of $5.46 in Rhode Island and $5.87 in Virginia to $11.13 in Mississippi, $13.06 in West Virginia, and $13.13 in New Hampshire. (Group 8 embraces Connecticut, Delaware, District of Columbia, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan (Southern Peninsula), Mississippi, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and West Virginia).

ice only was furnished, either by the carrier or by the shipper, were included in the traffic study; and the Commission did not consider nor determine what were the costs of performing those non-bunker re-icing services, although the charges therefor were among those on which the Commission authorized the 15 percent increase. The importance of the initial ice and top ice shipments is shown by the record and by the report.[12]

Following the order of January 9, 1956, in Docket 31342, which approved and authorized the 15 percent increase in all refrigeration charges, the carriers filed Supplement 27 to Perishable Protective Tariff No. 16, Agent W. T. Jamison's ICC 31 (on March 12, 1956), publishing the full increase authorized to become effective on April 17, 1956. In accordance with the Commission's order, the tariff supplement bears the notation: "published in conformity with Order of the Interstate Commerce Commission in Docket No. 31342 of January 9, 1956."

On March 2, 1956, and prior to the effective date of the tariff, petitions for reconsideration were filed with the Commission. Under the Commission's Rules of Practice, replies to the Florida petition for recon-

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[12] "Some of the protestants object to the exclusion of rules 240, 242 and 243 shipments from the carriers' sample, laying particular emphasis on the large number of such shipments, as indicated by the table on page 512 hereof, which approximated 43 percent of the total. Such shipments are iced initially by the shipper and are not re-iced in transit. Therefore, the amount of service given them and the revenue therefrom are minor compared with bunker re-iced shipments." (297 ICC 518).

In the year of the traffic sample, there were 38,895 refrigerated shipments of Florida vegetables, of which 55.97% were either initially iced only under Rule 240 or top-iced by the shipper under Rule 243.

sideration, filed on March 2nd, were due on March 22nd. However, on or about March 13th, the attorneys for the Meat Packers requested an extension of time in which to make reply. The Commission granted the request, and postponed the time for reply to April 23rd, a date which was six days subsequent to the effective date of the tariff supplement stating the increased charges.

The only effective remedy available to the parties was a restraining order against the Commission's order and to annul and set that order aside. The exhibits filed with the District Court clearly show that a substantial volume of the fruits and vegetables grown in California and Florida are sold at origin on an f.o.b. origin sales price. The available f.o.b. origin prices reflect the destination prices less the current transportation charges (including refrigeration charges). The grower, who has sold the fruits or vegetables produced by him, on such a basis, receives a lesser amount than he would otherwise have received had the increased refrigeration charges not been in effect. Thereafter, he is helpless and cannot recover any reparations by a formal complaint to the Commission under the Interstate Commerce Act, for the person entitled to such reparations (if later the Commission finds the specific charges to be unjust and unreasonable) is the one who has paid the charges, viz.: the person to whom the grower has sold on an f.o.b. origin price basis. The subsequent award of reparations is therefore a "windfall" to the purchaser-shipper, and the measure of the irreparable loss to the grower-seller.

The complaint was filed in the District Court prior to the effective date of the increased refrigeration

charges. On final hearing, the three-Judge Court dismissed the complaint (and intervening complaints).

The questions involved, and presented by this appeal, concern the order of the three-Judge District Court which denied the relief sought by the plaintiffs (and intervening plaintiffs), the appellants here, and dismissed the complaints.

The opinions of the District Court, upon which the order of dismissal is predicated, makes it clear that the order was based upon an erroneous misconception of the nature and substance of the Commission's Report and Order in Docket 31342. The District Court incorrectly held this "to be a case governed by the doctrines of the general revenue cases" (11a), that "the Commission's order is permissive, no particular charges are fixed, and the lawfulness of particular charges was not considered or decided" (9a), that the plaintiffs "have mistaken their remedy" in seeking review by the Court instead of attempting an additional formal complaint, under Sections 13 and 15 of the Interstate Commerce Act, before the Commission, and that the doctrine of the *Arizona Grocery* Case (*Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 52 S. Ct. 183, 76 L. Ed. 348) "has no application under the permissive provisions of an order in a general revenue case such as is this case" (16a). Indeed, the majority opinion of the District Court erroneously stated the power and duty of the Commission to adjust rates "so that carriers as a whole, or in each of such rate groups or territories as the Commission will designate, will earn an aggregate net operating income equal to a fair return upon the aggregate value of the railway property of

the carrier used in transportation service" (5a) under 49 USCA sec. 15(a)(2) as it appeared in the Transportation Act of 1920, but subsequently repealed.[13]

It is true that the majority opinion of the District Court states, under the erroneous assumption that this is a "revenue" and not a "rate" case, that "the evidence submitted was of a kind and character sufficient to permit a generalization upon which findings could be based and conclusions drawn" (11a). However, the District Court overlooked the findings in the Report and the facts in the record which conclusively demonstrate that the evidence was not comprehensive in scope, did not support the ultimate conclusions, and clearly that discriminating treatment is visited upon important section 2 traffic (fresh fruits and vegetables), much of which was excluded from the Commission's consideration in arriving at the conclusions stated in the Report.

The District Court conceded that "it is true that Section 4 charges reflect only the cost of ice and salt, and the cost of switching, while Section 2 charges include also ice haulage, bunker damage, supervision and other elements" (13a). The elements "covered by the section 2 charges, but not included in the section 4 charges, amount to about 19 percent thereof" (297 ICC 523). Those elements in the

[13] Sec. 15(a)(2) of the Interstate Commerce Act now reads: "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

section 2 charges, which are not in the section 4 charges, are increased by the Commission's order authorizing 15 percent increase — while at the same time authorizing the same percentage increase of section 4 charges but with comparable elements of expense excluded therefrom. The railroads cannot lawfully discriminate; and certainly the Commission has no power to authorize, either by creating or by increasing, a discrimination which is declared unlawful by the statute. The District Court erroneously assumed that an *increase* of discrimination is not prohibited by the statute—for it is said (13a):

> "If there be any discrimination between Section 2 and Section 4 traffic, and this we do not decide, it is a discrimination which existed prior to the proceedings before the Commission whence issued the order under attack. Such discrimination, if any there be, did not result from nor was it substantially altered by the Commission's order."

**(e) QUESTIONS INVOLVED ARE SUBSTANTIAL.**

Since World War II, incident to that War "and its economic aftermath," there have been numerous so-called "general revenue" cases before the Interstate Commerce Commission involving the whole body of the charges of rail carriers throughout the nation.[14] Some of the emergency or general revenue proceedings have been before this Court, particularly as they

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[14] Ex Parte No. 162, Increased Railway Rates, Fares, and Charges, 1946, 264 ICC 695, 266 ICC 537;
Ex Parte No. 166, Increased Freight Rates, 1947, 269 ICC 33, 270 ICC 81, 270 ICC 93, 270 ICC 403, 279 ICC 303;
Ex Parte No. 168, Increased Freight Rates, 1948, 272 ICC 695, 276 ICC 9;
Ex Parte No. 175, Increased Freight Rates, 1951, 280 ICC 179, 281 ICC 557, 284 ICC 589, 289 ICC 395, 292 ICC 23, 297 ICC 17;
Ex Parte No. 196, Increased Freight Rates, 1956, 298 ICC 279.

affected intrastate rates and charges,—see *United States* v. *Louisiana,* 290 U.S. 70, 54 S. Ct. 28, 78 L. ed. 181, and *King* v. *United States,* 344 U.S. 254, 73 S. Ct. 259, 97 L. ed. 301.

Charges for refrigeration service were not affected by the Commission's decisions in the general revenue cases, except in two instances.[15] The reason for excluding refrigeration charges from the effect of general revenue cases was stated in the Commission's last report in Ex Parte No. 196, Increased Freight Rates, 1956, 298 ICC 279, 346, to be that "the general showing of increased wages materials, supplies, and taxes" is not sufficient to warrant an increase in refrigeration charges.

Docket No. 31342, Proposed Increased Refrigeration Charges, 297 ICC 505, was not an emergency or general revenue case nor did it involve the whole body of rail charges but it concerned only the cost of performing, and just and reasonable rates for a single accessorial service, viz.: refrigeration charges, perishable freight, a relatively small portion of the total rail freight.

The lower Court[16] erroneously misconceived the nature of the Commission's order, the opinion of the District Court (as well as the special concurring opinion of Judge DeVane) holding that this is "a case governed by the doctrines of the general revenue cases" (144 F. Supp. 524) and "this is a revenue case and not a rate case" (144 F. Supp. 527).

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[15] Ex Parte No. 162, Increased Railway Rates, Fares, and Charges, 1946, 266 ICC 537; and Ex Parte No. 166, Increased Freight Rates, 1947, 270 ICC 403.

[16] *Florida Citrus Commission et al* v. *United States,* et al, 144 F. Supp. 517.

The decision of the District Court herein, dismissing the complaint, is founded squarely upon two cases, viz.: *Algoma Coal & Coke Co.* v. *United States,* 11 F. Supp. 487 (involving Ex Parte No. 115, Emergency Freight Charges, 1935, 208 ICC 4), and *Koppers Company* v. *United States,* 132 F. Supp. 159 (involving Ex Parte No. 175, Increased Freight Rates, 1951).

The Commission's Order in Docket 31342, Proposed Increased Refrigeration Charges, which was under attack in the District Court, was the Commission's "final disposition" of the proceeding at the very least "declaratory in form" (Title 5 United States Code, sec. 1001(d)) and it was a "grant of * * * authority" (subsection (f)) to the railroads to publish and make effective the increased refrigeration charges, found and declared by the Commission to be just and reasonable. Even if it were nothing more, it was "a declaratory order to terminate a controversy" (Title 5, U.S. Code, sec. 1004(3)). The order was more than that—it modified outstanding orders which otherwise prevented the increases from being made effective, it made findings as to every element of costs, and it approved and prescribed the maximum rates or charges which can be assessed for refrigeration service.

If the doctrine applied by the lower Court in dismissing the complaint be correct, then it means that judicial review never can be had when the Commission enters a maximum rate order. Under the lower Court's interpretation, either the Commission by a mere change in the form of its order or the carriers by "voluntarily" publishing something less than the prescribed maximum could circumvent the shippers

and preclude any judicial review. Such interpretation would emasculate the statute—Title 28 U.S. Code sec. 1336, that "the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend in whole or in part, any order of the Interstate Commerce Commission."

The lower Court erroneously assumed that "The Commission's order (in Docket 31342) is permissive, no particular charges are fixed, and the lawfulness of particular charges was not considered or decided" (144 F. Supp. 523). It is true that the Commission's order does not mandatorily require the establishment of the increased charges; but neither does any maximum rate order of the Commission. The lawfulness of maximum particular rates for refrigeration service was fixed, and the lawfulness of both section 2 and section 4 refrigeration charges was considered, and improper criteria adopted by the Commission in deciding those issues. Not only was there an affirmative finding "that an increase in the specified refrigeration charges in excess of 15 percent is not justified" (297 ICC 554), but also there was the affirmative finding that the "refrigeration charges may be increased" 15 percent, and "that the charges so increased will be just and reasonable for the future."

The philosophy or doctrine that judicial review may be evaded and administrative orders made permanent, even though unlawful, merely by the form of the orders, is inherent in the Court's suggestion that plaintiffs' "remedy is clearly by proceedings under sections 13 and 15 of the Act (49 USCA secs. 13, 15)" (144 F. Supp. 527). Under Section 13 of the Interstate Commerce Act, an investigation complaint or proceeding may be instituted "by petition" which

"state the facts" and complains "of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof," or the Commission may, "at any time," "institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made." Since the Transportation Act of 1920, in any such investigation, inquiry, or complaint proceeding, the Commission has been "authorized and empowered to determine and prescribe" either (1) the just and reasonable rate, (2) the maximum, or (3) the minimum, or (4) the maximum and minimum. The "order" which the Commission is then empowered and authorized to make (in the case of a maximum rate Order) is that the "carriers shall cease and desist from such violation" and "shall not thereafter publish, demand, or collect any rate, fare, or charge * * * in excess of the maximum * * * so prescribed.[17] When the Commission enters its final order, as was done in Docket 31342, determining and prescribing the maximum refrigeration charges which could thereafter be published, demanded, and collected by the carriers, nothing

[17] 49 USCA sec. 15(1): "That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, * * * the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charges, * * * and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, * * *."

further was required as a predicate for judicial proceedings under Title 28 US Code sec. 1336. Whether the Commission denominated its order one in a rate case or one in a general revenue case, or whether the carriers "voluntarily" published the maximum permitted by the Commission's report and order or published a charge within the lawful range of the order, ought not to preclude a judicial review of the order. A subsequent futile attempt by plaintiffs to obtain,, under sec. 13 or sec. 15 as suggested by the lower Court, a different order than the final order actually entered in Docket 31342, is not required by law nor could it be anything except an invitation to prolonged administrative delays and subversion of the substance of orders entered.

One instance of judicial review of an order of the Commission which permitted, but did not require, certain charges found by the Commission to be lawful, is *Secretary of Agriculture* v. *United States,* 347 US 645, 74 S.Ct. 826, 98 L. ed. 1015. In the 1948 report of the Commission, certain unloading charges on fruits and vegetables at New York and Philadelphia were found to be lawful; but on a further hearing, 286 ICC 119, the schedules stating such charges were ordered canceled "and the proceeding discontinued without prejudice to the establishment of charges in conformity with the views expressed herein," viz: lower charges as therein set forth. The lower charges, thus approved by the Commission, were published, and judicial review was sought in the District Court. The District Court's decision was reversed by this Court, and remanded to "the Commission for further proceedings not inconsistent with this opinion." Those unloading charges were "permissive" in the same

sense as the refrigeration charges in Docket 31342, viz: the Commission approved them but did not mandatorily require their publication—they were approved, determined, prescribed, authorized, in identically the same sense, and the carriers voluntarily published the maximum thus approved and authorized by the Commission.

A similar case where there was judicial review of an order of the Commission, the effect of which "was to permit, if not require, the railroads to charge higher reshipment rates for ex-barge than for ex-lake and ex-rail grain" (330 U.S. 572) was *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, 67 S. Ct. 894, 91 L. Ed. 1102. On the first appearance of that case in this Court, there was a reversal of the District Court because the Commission's decision then "carried 'no implication of approval of any rates here involved'" and this Court "reserved for future consideration in a proceeding before the Commission the amount, if any, which the eastern railroads could increase 'reshipping' rates for ex-barge over those for ex-lake and ex-rail grain." (330 U.S. 572, quoting from *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 US 671, 688, 691, 63 S. Ct. 1296, 87 L. ed. 1655, 1666, 1668). Upon consideration of that question, the Commission ordered canceled "the scheduled reshipping rate increase 'without prejudice to the filing of new schedules in conformity with the findings herein.' Thus the effect of the whole order was to permit, if not require, the railroads to charge higher reshipment rates for ex-barge than for ex-lake and ex-rail grain." (330 U.S. 572). The three-Judge District Court enjoined that order in part, and it was affirmed by the Supreme Court.

The jurisdiction of the Courts cannot, and ought not to be, defeated by the mere form of an order. A somewhat analogous situation was presented in *Southern Pacific Terminal Company* v. *Interstate Commerce Commission,* 219 U.S. 498, ... S. Ct. ..., 55 L. ed. 310, where the first question was whether there was an "actual controversy," it being claimed that the order of the Commission had expired and therefore that the case should be dismissed. This Court ruled against that contention.[18]

In another case, *Southern Pacific Company* v. *Interstate Commerce Commission,* 219 US 433, 55 L.ed. 283, the lower Court was reversed, with directions to enter decree declaring order of Interstate Commerce Commission to be void. The holding in *Southern Pacific Terminal Co.* v. *I.C.C., supra,* was affirmed, and it was further said:

> "In addition to the consideration expressed in that case, it is to be observed that clearly the suggestion is without merit, in view of the possible liability for reparation to which the railroads might be subjected if the legality of the order were not determined; and the influence and effect

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[18] *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 US 498, 55 L.ed. 310. "The case at bar comes within the rule announced in *United States* v. *Trans-Missouri Freight Asso.*, 166 US 290, 308, 41 L.ed. 1007, 1016, 17 Sup. Ct. Rep. 540, and *Boise City Irrig. & Land Co.* v. *Clark* (C.C. App. 9th Ct.) 65 CCA 339, 131 Fed. 415.

"In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The question involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and these considerations ought not to be, as they might be, defeated, by short-term orders, capable of repetition, yet evading review, and at one time the government, and at another time the carriers, have their rights determined by the Commission without a chance of redress."

> which the existence of the rate fixed for two years, if it were legal, would have upon the exercise by the railroads of their authority to fix just and reasonable rates in the future, clearly causes the case to involve not merely a moot controversy."

A very real problem confronting the shipping public by the order of the Commission in Docket 31342, authorizing the publication of the approved increased refrigeration charges, is the effect of that order under the doctrine of the *Arizona Grocery* Case.[19]

The effect of the District Court's ruling, that the plaintiffs should file anew complaints under sections 13 or 15 of the Interstate Commerce Act, is that, at their peril, they must forego appeal to the Courts for review and determination of the lawfulness of the final order entered by the Commission in Docket 31342. Of course, complaints may be filed under section 13, but the filing would be futile in the light of the actual determinations made by the Commission in Docket 31342, and even if a contrary decision were reached on such complaints the parties would be confronted with the principle of the *Arizona Grocery* Case that reparations could not be awarded in the face of the former erroneous conclusion in Docket 31342.

In this particular respect, the report and order in Docket 31342 is entirely different from the general

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[19] *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 284 US 370, 76 L. ed. 348. "Where the Commission has upon complaint, and after hearing, declared what is the maximum reasonable rate to be charged by a carrier; it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate."

revenue cases. There is no saving clause in Docket 31342, while in the Ex Parte general revenue cases there is always a specific provision with respect thereto. For example, in Ex Parte No. 196, Increased Freight Rates, 1956, 298 ICC 279, 347: "Rates and charges increased as herein authorized are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370."

The order in Docket 31342 is similar to that in *Columbia Broadcasting System* v. *United States*, 316 US 407, 86 L.ed. 1563, in that the order "is not made subject to future administrative determinations." The order's "applicability to all who are within their terms does not depend upon future administrative action. Instead they operate to control such action and to determine in advance the rights of others affected by it." The order presently determines rights on the basis of which the approved increased charges are currently assessed.[20]

The application of the doctrine of the *Algoma and Koppers cases, supra,* to the case at bar, or the extension of such doctrine of lack of judicial review to final orders making administrative determinations materially and substantially affecting the rights of parties, is a dangerous precedent. It would permit the administrative agency or the carriers, at will, to circumvent and avoid judicial review. It would sacrifice substance to mere form. A current instance of the latter

[20] 316 US 425: "The ultimate test of reviewability is not to be found in an over-refined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control."

is found in *Dixie Carriers* v. *United States*, 143 F. Supp. 844.[21]

The substantial importance of the questions involved to the appellants is clearly indicated and emphasized by the fact, admitted by the Commission's report, that 43 percent of the traffic was subjected to increased charges although the cost of that important traffic was not considered nor determined in the report, that the "section 2" traffic of appellants is subjected to increased cost elements despite the total absence of charges for such elements against similar "section 4" traffic, the fact that the Commission's order authorizes the same increase of 15 percent on refrigeration charges that are 76 percent below cost and charges that already are 9 percent and more higher than cost, the fact that the Commission authorized 15 percent increase in switching charges on "section 4" traffic but used an increase of 146 percent in determining like switching costs on section 2 traffic, the fact that the Commission authorized an increase of 15 percent on charges for salt on section 2 traffic and an increase of 5 percent (99¢ to $1.04 per cwt. on section 4 traffic, the fact that proper costs of rendering refrigeration service on section 2 traffic was not determined, and the fact, e.g., that the uniform percentage increases on all charges alike operates to charge greater amounts for ice in Florida, Texas and California than the costs thereof found by the Commission and less than cost in other areas. As an illustration, the Commission,

[21] *Dixie Carriers* v. *U.S.*, 143 F. Supp. 844, 852: "We do not regard this in a technical light at all. If administrative agencies, no matter how highly motivated their particular action may be, can, under the form of nunc pro tunc corrective orders, presumably 'correct' the subject order to meet the objections specifically urged in a petition for judicial review, effective review would be denied. The vice of the 'and good cause appearing' technique is that it affords nothing the parties or court can take hold of to scrutinize and measure as the basis for the action."

as shown by the Report, used the amount of $6.91 per ton as the restated cost of ice furnished at icing stations in Virginia, although the actual cost for all ice furnished in Virginia was only an average of $5.87 per ton.

The unlawful result of the Commission's order, contrary to the spirit and the letter of the Interstate Commerce Act, makes it vital that the plaintiffs be accorded the right to judicial review in conformity with the statute, and that the said order be declared invalid, and therfore be enjoined, annulled and set aside.

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